Office-Supreme Court, U.S.
FILED
AUG 24 1981
ALEXANDER L. STEVAS,
CLERK

No.

81-144

In The

Supreme Court of the United States

October Term, 1981

JAMES B. KNIGHT,

Respondent,

vs.

NASSAU COUNTY CIVIL SERVICE COMMISSION: GABRIEL S. KOHN, Chairman; EDWARD S. WITANOWSKI and EDWARD A. SIMMONS, Commissioners; ADELE LEONARD, Executive Director; RONALD J. LEVINSON, Deputy Executive Director; FLORENCE J. CADDLE, Personnel Specialist IV; ALBERT FONTANA, Personnel Specialist IV; and Others,

Petitioners.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Respondent had been assigned to a position of recruiting blacks for the Nassau County Civil Service Commission, to a significant measure, concededly because he was black. No evidence was presented that his race in any way exceptionally qualified him for such a position.

Such an assignment was violative of Title VII and the Equal Protection Clause because the courts have consistently held, and Congress has indicated, that race is not a permissible bona fide occupational qualification. The assignment of respondent to a position on the basis of his race was a badge of slavery and stigmatized respondent and caused him to suffer discrimination in the terms and conditions of his employment on the basis of his race in violation of Title VII and the Equal Protection Clause.

ARGUMENT

The racially motivated reassignment of plaintiff to a position recruiting blacks in black geographic areas was a per se violation of Title VII of the Civil Rights Act of 1964 and of 42 U.S.C. §§1981 and 1983.

The record is clear as to race being one of the controlling factors in plaintiff's reassignment to a recruitment job where he was expected to go into black geographic areas of Nassau County and attempt to recruit blacks into Civil Service. Accordingly, plaintiff's equal employment rights, protected by 42 U.S.C. §§1981, 1983 and 2000(e), were violated.

In *Baker v. City of St. Petersburg*, 400 F. 2d 294, 300-301 (5th Cir. 1968), the Court held that the practice of assigning black policemen only to black residential district patrol zones violated the Equal Protection Clause of the Fourteenth Amendment. The Court stated:

> "What the St. Petersburg Police Department did was to superimpose on natural geographic zones an artificial zone that rests on the Department's judgment of Negroes as a class. The Department concluded that Negroes as a class are suitable only for the zone approximately numbered 13. This is the kind of badge of slavery the thirteenth amendment condemns. See the majority and concurring opinions in Jones v. Mayer Co. 1968, 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189. See also United States v. Jefferson County Bd. of Educ., 372 F. 2d at 872-73. However, in this case it is necessary to hold only that a Department's practice of assigning Negroes solely on the basis of race to a Negro enclave offends the equal protection clause of the fourteenth amendment." 400 F. 2d at 300.

Similarly, in *Allen v. City of Mobile*, 331 F. Supp. 1134 (S.D. Ala. 1971), *aff'd. per curiam*, 466 F. 2d 122, it was held that the police department violated §§1981 and 1983 by assigning black officers to patrol only black zones of the city and by assigning black officers only to cases in which either victims or suspects were black. Other cases wherein similar results obtained include: *Strain v. Philpot*, 331 F. Supp. 836, 843-44 (M.D. Ala. 1971) (state cooperative extension service program violated Fourteenth Amendment by assigning black employees to counties which traditionally had black officers in cooperative and by assigning these employees to subject-matter areas dealing primarily with low income farming); and *Wade v. Mississippi Cooperative Extension Service*, 372 F. Supp. 126, 144 (N.D. Miss. 1974), *aff'd. in pertinent part*, 528 F. 2d 508 (5th Cir. 1976) (state agency found to have violated Fourteenth Amendment by assigning blacks to counties with predominantly black clientele).

Washington v. Davis, 426 U.S. 229 (1976) does not in any way diminish the authority of the aforementioned cases inasmuch as the discriminatory action of reassigning Knight clearly had a racially discriminatory purpose, *i.e.*, Knight was intentionally assigned to work in black areas because he was black.

Of course, such assignment practices have also been held to violate Title VII. E.E.O.C. Dec. 70-350, CCH E.E.O.C. Dec. ¶6118 (1969) (assignment of black salesman to "all Negro" accounts because it was good business nonetheless a disparate and racially biased work assignment violative of Title VII); E.E.O.C. Decision No. 71-866 (1970) CCH E.E.O.C. Decisions ¶6191, 3 BNA FEP CAS 265 (charitable organization engaged in running workshops for the training of retarded children violates Title VII by discharging a male instructor and retaining a female instructor on the ground that four of the clients are females); *Rogers v. Equal Employment Opportunity Comm.*, 454 F. 2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (unlawful to require that employee of a certain minority have contact only with the employer's patients of the same minority group).

Accordingly, the Court of Appeals acted pursuant to existing case law in reversing the District Court's finding that no discrimination had occurred in the racially motivated reassignment of plaintiff. The Court of Appeals correctly noted that Congress specifically excluded race from the list of permissible bona fide occupational qualifications. Moreover, assuming *arguendo* respondent's race was a permissible bona fide occupational qualification for his new job assignment, there was no evidence in the record that his race in any way exceptionally qualified him for his new assigned position.

CONCLUSION

The Court of Appeals acted correctly in reversing that part of the District Court's judgment which found that respondent's assignment to minority recruitment based upon his race was not a violation of Title VII or the Equal Protection Clause.

Respectfully submitted,

SPIZZ & GANS
Attorneys for Respondent